

### **REMARKS**

The Final Office Action of March 21, 2008 has been reviewed and the comments therein were carefully considered. Claims 1, 3-7, 10-13, 15-21, 24 and 25 are currently pending. Claims 1, 3-7, 10-13, 15-21, 24 and 25 stand rejected. Claims 1, 20 and 21 are currently amended.

#### **Rejection under 35 USC §112**

Claims 1, 3-7, 10-13, 15-21, 24 and 25 are rejected under 35 USC §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicant has amended independent claims 1, 20 and 21 to clarify that the Markush group of synthetic elements includes: a synthetic color selected from the *group consisting of* Citrus Red No. 2, D&C Red No. 28, D&C Yellow No. 10, FD&C Blue No. 1, FD&C Blue No. 2, FD&C Green No. 3, FD&C Red No. 3, FD&C Red No. 40, FD&C Yellow No. 5, FD&C Yellow No. 6, ferrous gluconate, orange B, riboflavin, ultramarine blue, ultramarine green, ultramarine violet, ultramarine red *and* combinations thereof. (emphasis added). The 35 U.S.C. 112 rejections are therefore respectfully requested to be withdrawn.

#### **Rejection under 35 USC §103**

Claims 1, 3-7, 10-11, 15-17, 20-21, 24 and 25 are rejected under 35 USC §103(a) as being unpatentable over Akihiko, et al., Japanese Patent No. 2001-323263 (“Akihiko”). Applicant respectfully traverses this rejection.

With regard to the rejections set forth above, Applicant respectfully brings to the Examiner’s attention that not only do the chemical, structural and physical properties of natural and synthetic colors differ, but the mechanisms by which natural and synthetic colors fade also differ. It would have been unobvious to one of ordinary skill in the art at the time the invention was made to combine a synthetic color with a botanically derived color stabilizer to prevent fading, as the two types of colors fade by different mechanisms—natural colors fade by an oxidative mechanism whereas synthetic colors fade by a reductive chemical mechanism. Paragraphs [0008] & [0014] – [0018]. Additionally, and as stated in paragraph [0014] of the

instant application, not only has color fading “been more thoroughly investigated with respect to natural colors”, as “it is believed that synthetic colors are inherently more stable,” the Applicant in the instant application addresses and provides a solution for the concern that “color fading is problematic for synthetically colored beverages.”

Furthermore, in addition to the reasons explained above, in regard to claims 1, 20, and 21, and the “synthetic color” limitation, although Examiner alleges that Akihiko discloses industrial riboflavin preparation, paragraph [0014] of the translation of Akihiko refers only to “riboflavin preparation [t]rade name ‘en tsi yellow’”. The additional natural colors listed in [0014] are also listed according to their chemical names followed by their trade names or names they are commonly sold under. Additionally, throughout the Akihiko specification, riboflavin is always mentioned in conjunction with additional natural colors, such as DEYUNARIERA, gardenia, curcmae rhizoma, etc. *See* paragraphs [0003], [0006], [0007], [0008], [0011] of the translation of Akihiko. For these reasons, Akihiko fails to disclose using botanically derived color stabilizers to prevent synthetic colors from fading in beverages.

In fact, Akihiko teaches away from the prevention of synthetic color fading in beverages using botanically derived color stabilizers, as set forth in claims 1, 20 and 21 of the present application. For instance, Akihiko teaches that “although the synthetic color of a tar system was used abundantly, the natural coloring matter obtained from a natural material is increasingly used from a viewpoint of safety . . .” Paragraph [0003] of Akihiko translation. Additionally, Akihiko discloses that “the chemical entity from which these natural coloring matter constitutes the coloring matter of food while safety is high has various structures, such as a carotenoid, flavonoid, and a tetrapyrrole derivative, since it is generally unstable as compared with a synthetic color . . . has the problem of fading and being easy to discolor by heat, light, etc.” Paragraph [0004] of Akihiko translation. Furthermore, Akihiko characterizes the problem to be solved by the invention as “obtain[ing] a pigment fading inhibitor effective in *natural* pigments . . .” and “there is no fading inhibitor generally applicable to any coloring matter.” Akihiko et al, Abstract & [0006] (emphasis added). In view of the foregoing, one of ordinary skill in the art would not deviate from Akihiko and seek to modify the teachings of Akihiko to include a synthetic color, yet the instant application does so.

It should be noted that ICS discloses only the composition of green coffee beans and notes that chlorogenic acids inherently present in coffee beans, “include various isomers of hydroxyl-cinnamoyl esters of quinic acid (*a common plant component*).” Emphasis added. Likewise, Horn-Ross evaluates the diets of a specific population (non-Asian women aged 50-79 in the San Francisco Bay area), noting the sources of phytoestrogenic compounds in their diets (“[c]offee was also found to be a major source of daidzein in *this population*” and “primary sources of coumestrol and the lignans include orange juice and coffee”) (emphasis added). One of ordinary skill in the art would not find the claims of the instant invention obvious when taking into account ICS and/or Horn-Ross in light of Akihiko. Nowhere in either ICS or Horn-Ross is color stabilization mentioned, and moreover, one of ordinary skill in the art would not find it obvious to use the phytoestrogenic compounds (daidzein and coumestrol) in the manner set forth in the instant claims to employ a botanically derived stabilizer with a synthetic color to prevent fading.

There is also no suggestion to combine the teachings of Akihiko with ICS and Horn-Ross, in a manner that results in independent claims 1, 20 and 21, except using Applicant’s invention as a template through a hindsight reconstruction of Applicant’s claims. Such hindsight reconstruction is improper under *KSR Int’l v. Teleflex, Inc.*, 127 S. Ct. 1727, 82 U.S.P.Q.2d 1385 (2007). Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rationale underpinning to support the legal conclusion of obviousness. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (cited with approval in *KSR*). Pursuant to *KSR*, the “discovery of a successful means of combining” elements is more likely to be nonobvious when the prior art teaches away from combining such elements. 127 S. Ct. at 1740. Here, Akihiko teaches away from using botanically derived color stabilizers to prevent fading of *synthetic color* in beverages, thereby reinforcing the non-obviousness of Applicant’s claims in the present application.

The dependent claims are patentable over the cited art for at least the same reasons as independent claims 1, 20 and 21, and for the additional features recited therein.

Claims 12-13 and 18 are rejected under 35 USC §103(a) as being unpatentable over Akihiko in view of COFFEE, Coffee: Related Beverages. For the same reasons set forth above, Claims 12-13 and 18 of the present application are unobvious and patentable over Akihiko. Additionally, Applicant notes that the COFFEE reference discloses substitutes for coffee, in relation to its *flavor and aroma*, as seen at least on pages 12 (“[t]he similarity of the [dandelion] root with that of chicory has long been recognized . . . the roasted product smells coffee-like, but the flavour of the brew is similar to that of roasted chicory”) and 16 (“[i]t was discovered early on that blending of coffee substitutes often improves the overall coffee-like flavour”) of this reference. Although dandelion root and hawthorn were well known-coffee substitutes, they were/are only coffee substitutes for flavor/drinkability purposes. COFFEE does not disclose the structure and properties of these ingredients in relation to coffee, or substitutability of these ingredients for coffee for any purpose other than flavor.

As stated in the response to the Office Action dated December 17, 2007, and as reiterated herein, the disclosure of Akihiko would not provide one of skill in the art a way to predict if coffee bean extract would be an effective fading inhibitor for any other colors, specifically the synthetic colors recited in the instant claims. One of ordinary skill in the art would recognize that just because one ingredient may be substituted for the other to impart a similar flavor, due to differing chemical structures and physiologically active compounds contained in these ingredients, there would be no expectation of these compounds to react or perform similarly in relation to their color inhibition effects on synthetic colors.

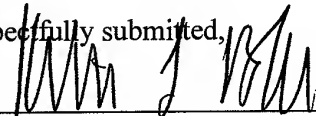
For the reasons stated above, Akihiko or COFFEE either alone or in combination, fail to disclose all of the limitations in Claims 12-13 and 18.

### **CONCLUSION**

In view of the above amendments and remarks, prompt reconsideration and full allowance of the claims pending in the subject application are respectfully requested. All rejections and objections have been addressed. Applicants respectfully submit that the instant application is in condition for allowance and respectfully solicit prompt notification of the same.

Please feel free to contact the undersigned should any questions arise with respect to this case that may be addressed by telephone.

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Respectfully submitted,  
  
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